LIBRARY
SUPREME COURT, U. S.

Office - Supreme Court, U.S.
FILED
FEB 7 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 737.

IRENE SHERMAN,

Petitioner,

against

SAM SHERMAN and SAMUEL W. SIEGEL,

Respondents.

BRIEF OF SAM SHERMAN IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI.

ABRAHAM N. DAVIS,
Counsel for Respondent Sam Sherman,
60 Wall Street

INDEX.

PAGE

JURISDICTION 1

STATEMENT 3

POINT I.—This court has no jurisdiction because the questions presented were never specifically set up, claimed or passed on in the State courts 8

POINT II.—No federal questions arise from the issues of the case. It was properly decided under New York law 15

POINT III.—The petition was not filed within the time required by law 17

POINT IV.—The application for a writ of certiorari should be denied, with appropriate costs and disbursements 18

Table of Cases.

	PAGE
Adler v. *Board of Education*, 342 U. S. 485	9, 13
Aero Transit Co. v. *Commissioners*, 332 U. S. 495	16
Barbour v. *Georgia*, 249 U. S. 454, 460	10
Barsky v. *Regents*, 347 U. S. 442	16
Block v. *Cutter Laboratories*, 351 U. S. 292	17
Bob-lo Excursion Co. v. *Michigan*, 333 U. S. 28	16
Central Hanover Bank & Trust Co. (*Momand*), 176 Misc. 183, affd. 263 App. Div. 801, affd. 288 N. Y. 608	16
Citizens Nat. Bank v. *Durr*, 257 U. S. 99, 106	10
Dodge v. *Cornelius*, 168 N. Y. 242	12
Durley v. *Mayo*, 351 U. S. 277	9, 13
Edelman v. *California*, 344 U. S. 357	9, 13
Holly v. *Lawrence*, 317 U. S. 518	17
Johnson v. *Western Union Co.*, 293 N. Y. 379, motion denied 293 N. Y. 859	12
Leigh v. *Green*, 193 U. S. 79	11
Loeder v. *Schroeder*, 149 U. S. 580	10
Louisville & Nashville R. R. Co. v. *Woodford*, 234, U. S. 46, 51	10
Lynch v. *New York*, 293 U. S. 52	9, 14
Mallett v. *North Carolina*, 181 U. S. 589, 592	10, 11
Malone v. *Hearst Hotel Corp.*, 274 N. Y. 106, 111	12
Michel v. *State of La.*, 350 U. S. 91	9, 12
Musser v. *Utah*, 333 U. S. 95	16
Nathan v. *Equitable Trust Co.*, 250 N. Y. 250	11
Pennsylvania Railroad Co. v. *Illinois Buick Co.*, 297 U. S. 447	9, 13
Reilly v. *Sternhart*, 218 N. Y. 660	12

PAGE

Sayward v. *Denny*, 158 U. S. 180 10

St. Louis & San Francisco R. R. Co. v. *Shephard*, 240 U. S. 240 10

Truax v. *Corrigan*, 257 U. S. 312 11

Williams v. *Kaiser*, 323 U. S. 471 17

Yakus v. *United States*, 321 U. S. 414 12

STATUTES.

Decedent Estates Law, Section 125 ..... 2, 5, 7, 8, 15, 16

28 U. S. C. Sec. 2101(c) 3, 17

28 U. S. C. 1257(3) 1, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 737.

IRENE SHERMAN,

Petitioner,

against

SAM SHERMAN and SAMUEL W. SIEGEL,

Respondents.

BRIEF OF SAM SHERMAN IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI.

The application for a writ of certiorari, served on January 14, 1958, should be denied because: (1) the federal questions presented were neither raised in, nor passed on by, any of the courts of New York that heard the case; (2) no federal question is involved; (3) it does not comply with the Rules of this court, and is not timely.

Jurisdiction.

Petitioner seeks to invoke the jurisdiction of this Court under 28 U. S. C. Section 1257 (Pet. p. 3). The applicable part of subdivision 3 of said section requires that the claim of "title, right, privilege or immunity" under the Constitution, be "specifically set up or claimed", as a pre-requisite for jurisdiction.

The record shows that no constitutional question was "specifically set up or claimed" in the Surrogate's Court of New York County where the issues were originally tried. No such question was presented to the Appellate Division of the New York Supreme Court, or to the Court of Appeals of the State of New York.

Petitioner's concession that the constitutional question was first raised in the New York Court of Appeals (Pet. p. 12) should not be misunderstood. It was not raised in that court on petitioner's appeal which resulted in the affirmance of July 3, 1957. Petitioner intended to say that the constitutional question was referred to for the first time in the papers on her application, made October 21, 1957 to the Court of Appeals, for leave to re-argue the appeal affirmed on July 3, 1957. And even then the constitutional question was not presented as a ground for re-argument. Leave to re-argue was "based solely upon the ground that the New York Court of Appeals *may* have overlooked, ignored or misinterpreted Section 125 of the Decedent Estates Law". (p. 6 of brief in support of motion; italics ours).

A constitutional question was indirectly referred to in that application. As alternative relief, petitioner asked for an order amending the remittitur "to state the grounds of the decision * * * in order to make it appear to the Supreme Court of the United States upon application for a writ of certiorari *whether or not* petitioner has been afforded due process, and *whether or not* she has been denied equal protection of the law as guaranteed by the Constitution * * *" (p. 2, Notice of Motion; italics ours).

Petitioner's motion was denied on October 24, 1957, without opinion. The Court of Appeals neither entertained nor passed on the alleged constitutional question. Jurisdiction is not conferred on this Court by virtue of petition-

er's application to the Court of Appeals for leave to re-argue.

An application for a writ of certiorari must be applied for within ninety (90) days after the entry of the judgment or decree sought to be reviewed (28 U. S. C. Sec. 2101 (c)). The date of the entry of the decree was either July 3, 1957 (Pet., p. 3), or August 19, 1957 (Pet. App. B, p. 31). The petition for a writ was served on January 14, 1957, and filed in this Court on January 22, 1958, more than ninety (90) days after the entry of the decree. This Court has no jurisdiction to entertain the application.

Statement.

The record demonstrates that there is, in fact, no federal question. The accounting proceedings were tried and determined solely on the basis of New York law.

The issues presented to the New York Surrogate involved the amount of Sam Sherman's obligation to the Estate of Moe Sherman, his deceased brother, under an agreement they made on November 8, 1945 (R. 88, fol. 263, 264; Accts. Ex. 3, R. 136-155). Under that agreement, Sam Sherman, as the surviving brother, elected to continue the business of Sherman Bros., Inc. as his own (Sam Sherman's Ex. 3, R. 212; R. 139, par 4; R. 141 par 7; R. 142-144). He, thereby, was obligated to pay to the decedent's estate, one-half of the net worth of the corporation, as determined pursuant to the provisions of said agreement (R. 139-140). Such net worth was to be determined as of the end of the month preceding Moe Sherman's death, was to be the difference between the book value of the assets and liabilities, with certain specified exceptions, and was to be determined by Samuel W. Siegel, described therein as the accountant for the corporation, whose determination was to be final

and binding (R. 139, 140). The one exception from book value material to this litigation was that merchandise shall be taken at the lower of cost or market (R. 140, fol. 418).

On October 18, 1949, Siegel reported the net worth of the corporation to be $255,057.79 (Accts. Ex. 2; R. 133-134). Sam Sherman paid the Estate one-half thereof, less an adjustment provided for in the agreement (R. 26, fol. 76). Because of dissatisfaction expressed by the petitioner (R. 26, fol. 77), Siegel, on November 29, 1949 engaged the accounting firm of S. D. Leidesdorf & Co. to check his figures, and not as his substitute (R. 157, 161, fol. 482; R. 89, fol. 266). Leidesdorf came up with a net worth of about $78,000 more than Siegel did (R. 26, fol. 77; Accts. Ex. 5, R. 166, 167). The explanation of this difference will appear later in this brief.

Thereupon the executor sought to make Sam Sherman pay an additional $39,000 roughly, representing one-half of the amount of net worth added by Leidesdorf to the Siegel amount. It was this claim of the Estate against Sam Sherman, on the issues raised by the Executor's account (R. 25-27), and the objections thereto filed by Sam Sherman (R. 29-33) and this petitioner (R. 34-36), that was tried by the Surrogate (R. 88, fols. 263, 364).

Relevant to the absence of good faith and merit in petitioner's contentions, is the fact that, despite the attack on the Siegel report made by her in both the removal and accounting proceedings, she offered no proof, in either one, of any other or different net worth of the corporation. And although Leidesdorf was given the fullest cooperation by Sherman Bros., Inc. (R. 163, fol. 489), without waiving any of Sam Sherman's rights (Sam Sherman Ex. 1, R. 208, 209), petitioner's then attorney would not supply any information, or subject matter, to be checked or investi-

gated by Leidesdorf, although expressly requested so to do (R. 164, fol. 490).

It is difficult to attach any good faith or merit to petitioner's arguments, that the provisions of Section 125 of the New York Decedent Estate Law, and the public policy expressed therein, applies to the so-called "evaluation by the Executor", and attacking Siegel's report of net worth, when no effort is made by her to prove to the Court that such "evaluation" is wrong. Both the Siegel and Leidesdorf reports were received in evidence in both of the aforementioned proceedings, yet petitioner failed to challenge the accuracy of either report.

The difference of $78,000 between the Siegel and Leidesdorf report was accounted for at the hearing before the Surrogate (R. 119, fol. 355). It is made up of three items: (1) $52,000 represents the difference between the methods applied by Siegel and Leidesdorf in fixing the lower of cost or market of the merchandise (R. 92-93); there was no difference in physical quantities (R. 168, fol. 502; R. 90; R. 119, fol. 355); (2) $20,000 represents the omission, by Siegel, of corporate profits from August 25 to August 31, 1949, because Siegel took the figures from the books which were closed on the 24th of the month, pursuant to a custom always practiced by the corporation (R. 170, fol. 509, R. 90, fols. 268, 269); and (3) $6,000 represents the omission by Siegel of the value of trimmings, because trimmings had never before been included in any inventory taken by the brothers (R. 90, fol. 270).

Items (2) and (3) above, totaling roughly $26,000, were eliminated from any contest. Sam Sherman voluntarily agreed to pay one-half thereof, or about $13,000, because they might be placed in the category of honest mistakes made by Siegel, and Sam Sherman was unwilling to take any advantage thereof (R. 96). Upon the basis of this

voluntary consent, the Appellate Division inserted in the modified decree the obligation of Sam Sherman to pay $12,956.59 to the Estate (R. 257, 258, fols. 771, 773).

The first of the aforesaid items, namely $52,000 representing the theory of pricing applied by Leidesdorf (R. 119, fol. 355), remained the subject of controversy. Sam Sherman contended that he was not bound by the Leidesdorf theory, and that it was not applicable to him or Sherman Bros. Inc. (R. 96, fol. 288). The record shows that the method of pricing the merchandise applied by Siegel was the same one he and Sherman Bros. had always used throughout their entire business careers (R. 126, fol. 378). Leidesdorf applied a theory promulgated by the American Institute of Accountants in July, 1947 (R. 117, fol. 350; Accts. Ex. 6, R. 192, Statement 6, pp. 198-200), which was long after the making of the agreement of November 8, 1945. In making the agreement the two brothers could not have anticipated the pricing of the merchandise upon a theory unknown to them and promulgated long after its execution. The Leidesdorf theory was even unknown to Siegel when he priced the inventory (R. 117, fol. 350). Siegel said that the Leidesdorf theory was not applicable to the ready to wear industry, which included this corporation, and which he, Siegel, never had applied, and does not apply. (R. 122, 123, 126, 127).

The Appellate Division sustained Sam Sherman's position, and modified the decree accordingly (R. 258), which modification was affirmed by the Court of Appeals, without opinion.

The claims of petitioner that Siegel occupied some dual capacity, that there was a conflict of interest, that his acts, including his report of net worth, were fraudulent, committed in bad faith, or were otherwise wrong, were presented by, and decided against, petitioner in the removal pro-

ceedings (R. 216-221) and the decree thereon was entered May 3, 1951 (R. 213). None of those issues are subject to review on the instant application for a writ.

The substance of petitioner's present contentions is that the decision of the New York Court of Appeals is wrong because it did not find that Section 125 of the New York Decedent Estate Law was applicable to the facts. That section relates solely to powers granted by a will. It is not applicable, under New York Law, to a contract or other inter-vivos agreement. Petitioner now seeks a review of a State court decision resting solely on local law. No federal question is involved. This Court will not review the interpretation and application of a state statute as laid down by the highest Court of the State.

Because of the absence of merit to petitioner's contention, she is forced to use ambiguous nomenclature. She describes the executor as an "evaluator", and says that the executor "evaluated" the net worth of the corporation, Sherman Bros., Inc. in violation of Section 125 of the Decedent Estate Law of New York. She is wrong. The executor made no such evaluation. The executor did not "evaluate" any asset of the Estate for any of the purposes set forth in said section; nor did the executor exercise any powers, under a will, enumerated in said section; nor did the executor receive any immunity such as is referred to in said section. As a matter of fact the Surrogate expressly held in the removal proceeding that the Executor is not exonerated "from responsibility for any omission, mistake, negligence or other act, if any, that may have occasioned pecuniary loss to the Estate" (R. 220, fol. 659).

Siegel determined the net worth of Sherman Bros. Inc. on October 18, 1949 (R. 133, fol. 398), as the accountant designated in the agreement for that purpose, and in accordance with the provisions thereof. He did not act as

executor (R. 139, fol. 416). He did not become the executor until November 14, 1949 (R. 20, fol. 59).

Furthermore what Siegel, as accountant, did in determining the net worth of the corporation did not involve an "evaluation" of any asset of the Estate. By the express terms of the agreement of November 8, 1945 (Accts. Ex. 3), the Estate had no interest in the shares of stock of the corporation issued to Moe and Sam Sherman jointly or to the survivor of them (R. 138, fols. 412-413; Sam Sherman Ex. 2, R. 210); nor in the business or assets of the corporation (R. 145, fol. 434). By no stretch of the imagination can it be successfully argued that Siegel, as executor, evaluated any asset belonging to the Estate within the meaning and intent of, or for the purposes set forth in, Section 125 of the Decedent Estate Law. And the Courts of New York have so decided.

It is clear, from this record, that no federal question exists, even if one had been timely and properly raised. The application should be denied.

POINT I.

This court has no jurisdiction because the questions presented were never specifically set up, claimed or passed on in the State courts.

This application for a writ does not come within the purview of 28 USC 1257 (3). No state statute repugnant to the Constitution is involved. The record is clear that petitioner never specifically set up or claimed any title, right, privilege or immunity under the Constitution either in the trial court, or in any Appellate Court of the State of New York. No court of the State considered or passed on the Constitutional questions presented in the petition. This

Court therefore lacks jurisdiction to entertain the petition, and it should be dismissed.

Durley v. *Mayo*, 351 U. S. 277, 278, 280, 281, 285;
Michel v. *State of La.*, 350 U. S. 91, 99, 101;
Adler v. *Board of Education*, 342 U. S. 485, 496;
Edelman v. *California*, 344 U. S. 357, 358, 359;
Lynch v. *New York*, 293 U. S. 52, 54;
Pennsylvania Railroad Co. v. *Illinois Buick Co.*, 297 U. S. 447, 462, 463.

It is inexact, as a statement of fact and law, for petitioner to say that although the constitutional question she now presents was raised by her for the first time in the New York Court of Appeals, this fact does not deprive this Court of jurisdiction (Pet. p. 12).

It has been already pointed out, in the statement under jurisdiction, that the first, and only, time any reference was made to a federal question was on October 21, 1957, in her application to the New York Court of Appeals, for leave to reargue her appeal decided July 3, 1957. And in that application, petitioner did not base her plea for leave to reargue on the ground of the existence of a federal question. She there refers only indirectly to a federal question in connection with her plea for alternative relief for an order amending the Court's remittitur in the respects set forth in our statement under Jurisdiction.

Such an application does not raise a federal question reviewable by this Court, especially since the motion was denied without opinion.

Petitioner's contention that the denial of her motion for leave to re-argue does not deprive this Court of jurisdiction is wrong, and the cases cited by her (Pet. p. 12) do not support her contention. She does not state, and gives no consideration to the fact, that no opinion was rendered with the denial of her motion. Manifestly, the record does

not disclose that the Court of Appeals, ever entertained, considered or passed on the alleged constitutional question raised then for the first time. This leaves nothing for this court to review.

In *St. Louis & San Francisco R. R. Co.* v. *Shephard* (240 U. S. 240, 241), this Court passed on the effect of raising a question for the first time on a motion to reargue which was denied, without opinion. Mr. Justice Van DeVanter, writing for the Court, said:

> "The claim under the Carmack Amendment was first set up and asserted in a petition for rehearing after the judgment in the trial court was affirmed by the Supreme Court of the State. The petition was not entertained but was denied without passing upon the Federal question thus tardily raised. That question, therefore, is not open to consideration here. Pim *v.* St. Louis, 165 U. S. 273; Mutual Life Ins. Co. *v.* McGrew, 188 U. S. 291, 308; McCorquodale *v.* Texas, 211 U. S. 432, 437; Forbes *v.* State Council of Virginia, 216 U. S. 396, 399; Consolidated Turnpike Co. *v.* Norfolk etc. Ry., 228 U. S. 325, 334."

To the same effect, are:

> *Citizens Nat. Bank* v. *Durr*, 257 U. S. 99, 106;
> *Barbour* v. *Georgia*, 249 U. S. 454, 460;
> *Louisville & Nashville R. R. Co.* v. *Woodford*, 234, U. S. 46, 51;
> *Sayward* v. *Denny*, 158 U. S. 180;
> *Loeder* v. *Schroeder*, 149 U. S. 580.

In *Mallett* v. *North Carolina* (181 U. S. 589, 592), cited by petitioner, the Supreme Cou t of the State did actually consider the federal questions raised on the application for a re-hearing, and disposed of them in the opinion which it rendered. Mr. Justice Shiras, writing for this Court makes this pertinent statement:

> "Had that court (the state court) declined to pass upon the Federal questions and dismissed the petition without considering them, we certainly would not undertake to revise their action."

In the same case (*Mallett* v. *North Carolina, supra*) with respect to another question raised for the first time in the application for re-hearing, to wit, that certain records allegedly improperly seized, were wrongfully admitted in evidence, thereby making the defendants witnesses against themselves, in contravention of the Fourteenth Amendment, Mr. Justice Shiras, for this Court said (pp. 600, 601):

> "Nothing seems to have been claimed, either in the criminal court, or in the Superior Court, as to the inadmissibility of the books as evidence on the ground of any provision of the Federal Constitution."
>
> * * * * * *
>
> Nor did the Supreme Court, in passing upon the contention (on the application for rehearing), deal with it as a Federal question, but as a mere question arising under the administration of the criminal law of the state and there is therefore nothing in its action to review" (p. 601).

Leigh v. *Green* (193 U. S. 79) and *Truax* v. *Corrigan* (257 U. S. 312), also cited by petitioner (p. 12), have no application because in the first case, the motion for rehearing was entertained, and the Federal question actually decided, and in the second, the federal question had been properly and timely urged.

Under New York law, the Court of Appeals will not entertain any question of law raised for the first time on a motion to re-argue.

> *Nathan* v. *Equitable Trust Co.*, 250 N. Y. 250, 253;

Dodge v. *Cornelius*, 168 N. Y. 242;
Johnson v. *Western Union Co.*, 293 N. Y. 379, motion denied 293 N. Y. 859.

And the Court of Appeals of New York will not pass on issues not raised in the Courts below, and mentioned for the first time in that court, for the purpose of reversing a judgment.

Malone v. *Hearst Hotel Corp.*, 274 N. Y. 106, 111.

In *Reilly* v. *Sternhart* (218 N. Y. 660), the New York Court of Appeals, in denying a motion to amend its remittitur, held, that a party

> "* * * cannot have a re-argument to submit questions of law which he failed to submit when the opportunity was offered to him. (Rogers *v.* Laytin, 81 N. Y. 642; Mount *v.* Mitchell, 32 N. Y. 702; Ward *v.* Craig, 87 N. Y. 550)".

It is submitted that the New York Court of Appeals could have properly denied the motion without considering the alleged federal questions, upon the ground that, under New York law, it will not entertain any question of law not raised in the Courts below, and raised for the first time in that Court, or that the decision rendered by it was right under New York law.

In *Michel* v. *Louisiana* (350 U. S. 91, 99, 101), this Court said (p. 99), quoting from *Yakus* v. *United States* (321 U. S. 414, 444):

> "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by failure to make timely assertion of the right * * *"

* * * * * *

"Petitioner's contention was not raised below, and we do not believe it has been properly put in issue" (p. 101).

In *Edelman* v. *California* (344 U. S. 357, 358, 359), this Court said:

"It is clear that this Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law (citing cases). Non-compliance with such local law can thus be adequate state ground for a decision below."

See also:

Pennsylvania Railroad Co. v. *Illinois Buick Co.*, 297 U. S. 447, 462, 463.
Adler v. *Board of Education*, 342 U. S. 485, 496.

Since the record before this Court does not show that the alleged federal questions were, in fact, considered and passed on by the Court of Appeals of New York, when it denied, without opinion, petitioner's motion for leave to re-argue, petitioner fails to establish that there is a proper question before this Court to review.

Durley v. *Mayo* (351 U. S. 277, 278, 281, 285), involved the question of this Court's jurisdiction to review a judgment rendered in the Supreme Court of Florida, without opinion. Objection to jurisdiction was based on the contention that the judgment of the State court may have rested on one or two adequate state grounds. One such ground was that the issues presented had been previously decided in another proceeding and constituted *res judicata* under State law. The other ground was that the federal issues presented to the Court had not been raised before in

comparable prior proceedings, and under State law, could not now be raised. On the first ground, the applicable statute of Florida on *res judicata* was cited. On the second ground, the decisions of the highest court of Florida were cited. Mr. Justice Burton, writing for the Court, said (p. 281):

> "In the face of these expressions of the law of Florida, petitioner, in order to establish our jurisdiction, must demonstrate that neither of these state grounds can account for the decision below. 'Where the highest court of the State delivers no opinion and it appears that the judgment *might* have rested upon a non-federal ground, this Court will not take jurisdiction to review the judgment.' *Stembridge* v. *Georgia,* 343 U. S. 541, 547". (Italics by the Court.)
>
> * * * * * *
>
> "We find nothing on its face showing that the Court must have decided the case on federal grounds rather than on readily available and substantial state grounds.
>
> "Inasmuch as the Supreme Court of Florida's denial of the 1955 petition *might* have rested on either of the State grounds now suggested by the State, petitioner has failed to establish our jurisdiction to decide the federal issues that he urges upon us. He has not shown that they have been passed upon by the highest court of his state" (p. 285).

Lynch v. *New York* (293 U. S. 52, 54, 55), points out that it is essential to the jurisdiction of this Court, in reviewing a decision of a State court, that it appear affirmatively from the record (1) that a federal question was presented in the State court, (2) that its decision of the federal question was necessary to the determination of the cause, and (3) that it was actually decided or that the judgment rendered

could not have been made without deciding it. Mr. Chief Justice Hughes then says, for this Court:

> "Where the judgment of the State court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction" (pp. 54-55).

It is respectfully submitted that the record before this Court establishes clearly that there is nothing for this Court to review, and that it lacks jurisdiction to entertain the federal questions presented by petitioner.

The application for a writ of certiorari should be denied.

POINT II.

No federal questions arise from the issues of the case. It was properly decided under New York law.

The burden of petitioner's application rests upon a claim that her constitutional rights have been invaded because the New York Court of Appeals did not apply the provisions of Section 125 of the New York Decedent Estate Law to the facts in the case. This contention is fallacious.

The agreement of November 8, 1945 (Accts. Ex. 3) is a valid and binding agreement and has been so held by the Surrogate and the Appellate Courts of New York (R. 218, fols. 652, 653; R. 222, 223; 104 N. Y. Supp. (2) 988, affd. 279 App. Div. 981, leave to appeal denied 279 App. Div. 1065, 304 N. Y. 990).

The will and codicil of Moe Sherman, were executed respectively on November 5, 1942 (R. 49) and January 5,

1944 (R. 52), prior to the execution of the agreement aforementioned. It is self evident that Sam Sherman's rights under the agreement cannot be destroyed or affected by the unilateral action of his brother in making a will and codicil before the date when the agreement was executed.

The Surrogate held that the will and codicil do not affect the agreement, especially so, since the amount to be paid to the Estate is fixed by the agreement and not by the will or codicil (R. 225, fol. 674).

He also holds that neither the provisions of Section 125 of the Decedent Estate Law, nor the public policy expressed therein, has application to a contract or other *inter vivos* agreement, citing *Matter of Central Hanover Bank & Trust Co. (Momand)*, 176 Misc. 183, affd. 263 App. Div. 801, affd. 288 N. Y. 608, as authority for his conclusion, and he states that there is nothing in the will affecting the performance of the agreement (R. 225).

The very language in said section of the Decedent Estate Law shows that it applies only to wills.

Affirmance by the Appellate Division, and by the New York Court of Appeals, indicates a like interpretation and application of said statute. The construction and application of a state statute by the highest court of the State, will be accepted by this Court as binding.

> *Aero Transit Co.* v. *Commissioners,* 332 U. S. 495, 499;
> *Bob-lo Excursion Co.* v. *Michigan,* 333 U. S. 28, 33;
> *Barsky* v. *Regents,* 347 U. S. 442, 448;
> *Musser* v. *Utah,* 333 U. S. 95.

The issues in this case involve an agreement made in New York, by New York residents, and enforced in New York. No federal statute is involved. The case was

decided on the basis of New York law, and rests on adequate state grounds, and a non-federal basis. Such a decision will not be reviewed by this court.

Williams v. *Kaiser*, 323 U. S. 471;
Holly v. *Lawrence*, 317 U. S. 518.

The decision involves the construction of local law, and not a federal question.

Block v. *Cutter Laboratories*, 351 U. S. 292, 299.

The application for a writ should be denied.

POINT III.

The petition was not filed within the time required by law.

The petition for a writ of certiorari was not served within ninety (90) days after the entry of the decree or order sought to be reviewed, as required by the statute (28 U. S. C. Sec. 2101 (c)).

The order of the Court of Appeals of the State of New York affirming the decision of the Appellate Division of the New York Supreme Court, was entered on July 3, 1957. The order of the Surrogate's Court of New York County, on the remittitur of the Court of Appeals, was made on August 19, 1957 and entered on August 22, 1957.

The petition for writ of certiorari, served on January 14, 1958, and filed on January 22, 1958, obviously, was served and filed more than ninety (90) days from the entry of the order or decree sought to be reviewed.

The application for a writ should be dismissed.

POINT IV.

The application for a writ of certiorari should be denied, with appropriate costs and disbursements.

Respectfully submitted,

ABRAHAM N. DAVIS,
Counsel for Respondent Sam Sherman,
60 Wall Street,
New York, N. Y.